

In order to properly describe and discuss the current conflicts, I have outlined the legal and policy issue, followed by a list of potential solutions/action below. Next, I have outlined the basic issues and the associated guidance. Then I have identified potential solutions/actions, followed by a discussion of the pros and cons of each of the potential solutions/action. At the end of the document, I have extracted what I believe to be the relevant language of each of the governing regulations/policies for your reference. Finally I have attached all of the referenced documents IN FULL to the bottom of this email.

Summary of legal/policy Issues:

- SFPD and FBI SF have a long standing and valued relationship and there is no question that FBI SF highly values SFPD participation in the JTTF. FBI SF currently has two (2) TFOs assigned to the FBI JTTF who are primarily assigned guardian leads (Type 1&2 Assessments) originating in and around the City of San Francisco.
- Per the language contained in the FBI SF JTTF MOU, SFPD General Order 8.10 , and SFPD Bureau Order 5/11 plainly state that SFPD JTTF Officers are subject to FBI policies and directives AND SFPD policies and procedures simultaneously.
- There are requirements set forth in SFPD General Order 8.10 which govern investigations into First Amendment Activities. Requirements set forth in DIOG for opening type 1 and type 2 assessments MAY be in conflict with General Order criteria.
- The language contained in both documents require SFPD Officers to make certain disclosures of their FBI investigative activities, which are prohibited by FBI policies and procedures to include but not limited to restrictions on dissemination of classified materials, and dissemination of information pertaining to ongoing FBI investigations.
- Failure to comply with SFPD General Order 8.10 subjects SFPD FBI TFOs and other SFPD staff to discipline and/or dismissal.
- Compliance with SFPD General Order 8.10 subjects SFPD FBI TFOs to possible criminal exposure for disseminating/disclosing FBI documents to include classified documents.
- SFPD is seeking assistance from the FBI and would like to know what, if any, information the FBI will allow SFPD to utilize to meet the requirements of SFPD General Order 8.10 and the Bureau Order
- SFPD is seeking guidance on how they can resolve the conflicts between General Order 8.10 and FBI Policy.

Summary of Potential Solutions:

- Do not assign SFPD TFOs any Guardian leads or investigations that have ANY First Amendment involvement whatsoever.

- SFPD withdraw from the JTTF
- Provide SFPD TFOs with FBI approved/sanitized information which can populate an 8.10 memo, which will then be subject to Police Commission Audit and Office of Citizen Complaint review
- SFPD amend General Order 8.10
- SFPD amend SFPD Bureau Order
- FBI and SFPD amend the SFPD/FBI JTTF MOU
- Take no formal action

Issue #1 Conflicting guidance regarding investigations into First Amendment Activities:

- SFPD JTTF officers are generally assigned to work FBI Guardian Leads (Type 1&2 Assessments)
- DIOG §5.5 requires an authorized purpose and a clearly defined objective(s) before opening an assessment and that the assessment is not based solely on the exercise of First Amendment rights or on the race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity of the subject, or a combination of only such factors.
- DIOG § 5.6.3.1 defines a Type 1&2 Assessment : seek information, proactively or in response to investigative leads, relating to activities – or role of individuals, groups or organizations in those activities –constituting violations of Federal criminal law or threats to the national security (i.e., the prompt checking of leads on individuals, activity, groups, or organizations).
- San Francisco Police Department General Order 8.10 requires all officers (including those assigned to the JTTF) to only conduct criminal investigations that involve the first amendment when the officer has an articulable and reasonable suspicion to believe that:
 1. They are planning or are engaged in criminal activity
 - a. Which could reasonably be expect to result in bodily injury and/or property damage in excess of \$2500
 - b. Or which constitutes a felony or misdemeanor hate crime, **and**
 2. The First Amendment activates are relevant to the criminal investigation.
- SFPD General Order 8.10 defines “Articulable and Reasonable Suspicion”: The standard of reasonable suspicion is lower than probable cause. This standard requires members to be able to articulate the specific facts or circumstances indicating a past, current, or impending violation, and there must be an objective bass for initiation the investigation. A mere hunch is insufficient.

- FBI SF JTTF Guardian leads usually involve on some level the exercise of first amendment activities. However, and in compliance with the DIOG, these investigations are NEVER based solely on the first amendment, but must have another authorized purpose.
- If an SFPD TFO investigates a guardian lead which has some sort of first amendment activity associated with it, then unless he/she can meet the articulable and reasonable suspicion criteria of General Order 8.10., then he/she may be in violation of General Order 8.10 by following DIOG §5.5 and §5.6.3.
- There needs to be a clear legal analysis of whether or not the DIOG standard for opening assessment meet the 8.10 criteria.
- In a letter to the ACLU dated December 20, 2011, General Counsel Andrew Weisman addressed the ACLU's concern regarding the FBI conducting assessments. Perhaps we can utilize the language contained in this letter to somehow address some of the above referenced concerns. See attached letter.

Issue #2 General Order 8.10 Memorandum :

- Assuming that the First Amendment criteria outlined in General Order 8.10 are met, the order also requires the SFPD officer submit a 8.10 memorandum via his SFPD chain of command requesting approval to open an investigation, and that the request be approved before any investigative activity comments.
- Therefore, any time a SFPD TFO works a guardian lead, or an investigation, that has ANYTHING related to first amendment activity (no matter how trivial a portion of the investigation), that he/she must submit the 8.10 request memorandum AND obtain SFPD approval before he/she can even begin working on the FBI guardian lead/investigation. This essentially translates to SFPD having oversight of FBI investigations
- The SFPD would then have control over the 8.10 memorandum for both approved and DENIED requests for investigation.
- If the 8.10 memorandum request is denied, then the SFPD JTTF TFO is in violation of 8.10 if he/she conducts the FBI investigation. SFPD JTTF members who violate SFPD General Order 8.10 (willfully or otherwise) are subject to discipline or dismissal.
- If the SFPD JTTF TFO does not submit the 8.10 memo, then he/she is in violation of SFPD General Order 8.10 and is subject to discipline or dismissal.
- The submission of the 8.10 memorandum requires the FBI JTTF TFO to disclose details (most likely classified) obtained via the FBI investigation to people without a security clearance and without a need to know. Such disclosure is specifically prohibited by security regulations as well as Section IX of the JTTF MOU.
- The FBI will not allow such disclosure.

Issue #3 General Order 8.10 Audit by San Francisco Police Commission:

- Assuming the 8.10 memorandum are submitted by the JTTF TFOs, General Order 8.10 states: The President of the Police Commission shall designate a member of the Commission to be responsible for monitoring compliance with 8.10
- General Order 8.10 states: Every month, the designated Police Commission member shall review the written requests and authorizations for the initiation or continuance of an investigation that is required by these guidelines.
- General Order 8.10 states: On an annual basis, the Director of the Office of Citizen Complaints or his/her designee shall conduct an audit of the Department's files, records and documents and shall prepare a report to the Commission regarding the Department's compliance with the guidelines. In addition, the Police Commission may conduct or direct the OCC to conduct such an audit unannounced at any time.
- These 8.10 audits and reviews require that, assuming a JTTF SFPD TFO member actually provided an 8.10 memorandum and got approval before conducting FBI Guardian Leads, that the information provided is subject to the above listed reviews. These reviews would also include 8.10 memorandum details for investigations for which 8.10 approval was DENIED.
- As is discussed above, SFPD and SFPD JTTF Officers can't comply with SFPD General Order 8.10 without disclosing/reporting FBI Classified information in violation of the FBI MOU and other FBI policies and procedures to included directives pertaining to the dissemination of classified information to members of the Police Commission
- SFPD JTTF members who violate SFPD General Order 8.10 (willfully or otherwise) are subject to discipline or dismissal.

Issue #4 San Francisco Ordinance Amending San Francisco Administrative Code §2A.74, (passed in 2012)

- San Francisco Ordinance amending Administrative Code §2A.74 says "The City and County of San Francisco, including but not limited to the San Francisco Police Department, may assist federal agencies on the FBI JTTF in preventing and investigating possible acts of terrorist and other criminal activity only in a manner that is fully consistent with the laws of the State of California, including but not limited to the inalienable right to privacy guaranteed by Article 1, Section 1 of the California Constitution, as well as the laws and policies of the City of County of San Francisco and, as applicable to the Police department, that Department's policies, procedures and orders."
- The ordinance requires compliance with SFPD General Order 8.10 and SFPD Bureau Order
- San Francisco Ordinance amending Administrative Code §2A.74 requires that any amendment to the SFPD FBI JTTF MOU or other written contract or arrangement the

Chief of Police shall submit the proposed MOU and any related Department General Orders or Bureau Orders for discussion and public comment at an open meeting of the Police Commission.

- Therefore, any attempt to amend the existing MOU, amend Bureau Order or SFPD Department General Order 8.10, and/or amend the applicable SFPD Bureau order shall be subject for discussion and public comment at an open meeting of the police commission.
- If any amendments are proposed, the FBI has a vested interest in providing clear and concise language for those amendments which should be vetted by FBIHQ and OGC as the language will be subject to public discussion, public comment, and most likely debate.
- San Francisco Ordinance amending Administrative Code §2A.74 requires that by January 31 of each year, the Chief of Police shall provide to the Police Commission a public report with appropriate public information on the Police Department's work with the JTTF in the prior calendar year, including any issues related to compliance with this section."
- The ordinance requires the SFPD Chief of Police to provide a report to the Police Commission which shall make public SFPD TFP JTTF work. Although the ordinance says the report is to contain "appropriate public information", the information contained such a report would originate from FBI investigative activity which the MOU clearly indicates shall not be disseminated without the approval of the FBI.
- The FBI will not allow this type of information to be disseminated.
- The SFPD Chief of Police can not comply with this ordinance unless the FBI approves and provides the Chief with authorized language/information.

Discussion/Issues with Potential Solutions listed above:

- Do not assign SFPD TFOs any Guardian leads or investigations that have ANY First Amendment involvement whatsoever.
 - This would have a negative operational impact on the work of JTTF
 - Implementation of a subjective assignment of leads based on an interpretation of what constitutes "related" to the First Amendment and the definition of "reasonable suspicion" would be nearly impossible to accomplish with precision and uniformity.
- SFPD withdraw from the JTTF
 - The SFPD is an integral part of the JTTF and withdrawal of a major police department would be counterproductive to the JTTF mission and overall image.
- Provide SFPD TFOs with FBI approved/sanitized information which can populate an 8.10 memo, which will then be subject to Police Commission Audit and Office of Citizen Complaint review

- This solution may be workable but would require FBI input and approval in the sanitization process which may ultimately lead to a product which still does not satisfy the OCC
- This production of sanitized information due to problems specific to the SF JTTF would set a precedent which may lead to similar ACLU requests to other JTTFs.
- SFPD amend General Order 8.10
 - Amending 8.10 to exclude classified legally restricted material from compulsory dissemination to the OCC for the initiation or review of JTTF matters
 - Amend 8.10 to better define “reasonable suspicion” and what constitutes a matter “related to the First Amendment.
 - The amendment would be subject of public comment.
- SFPD amend SFPD Bureau Order
 - Amend the SFPD Bureau order to reflect that SFPD personnel assigned full time to the JTTF must follow FBI policy with respect to classified legally restricted material.
 - The amendment would be subject of public comment.
- FBI and SFPD amend the SFPD/FBI JTTF MOU
 - Amend the SFPD Bureau order to reflect that conflicts between the standards and requirements of the SFPD and FBI will be resolved in favor of protecting legally classified and restricted material
 - The amendment would be subject of public comment.
- Take no formal action
 - The problems presented by these issues have recurred every year since 2013 driven predominantly by the annual SFPD report to the OCC. The issues created by the yearly report will grow more complicated and will put SFPD JTTF officers at continued risk of administrative and other legal repercussions for simply complying with FBI policy and law regarding classified material if left unaddressed.
 - In 2016, one JTTF member was summoned before the Police Commission for allegations of 8.10 violations related to his refusal to disclose FBI classified information .

**Relevant sections of the
JTTF SFPD/FBI MOU**

Section IV CONTROLLING DOCUMENTS states:

(B)

“All guidance on investigative matters handled by the JTTF will be issued by the Attorney General and the FBI. The FBI will provide copies of the above –listed guidelines and any other applicable policies for reference and review to all JTTF members. Notwithstanding the above, this MOU does not alter or abrogate existing directives or policies regarding the conduct of investigations or the use of special investigate techniques or controlled informants. The FBI agrees to conduct periodic briefings of the member agencies of the JTTF pursuant to all legal requirements and FBI policies.”

Section V PROGRAM MANAGEMENT DIRECTION AND SUPERVISION states:

(B)(5)

“Each JTTF member will be subject to the personnel rules, regulations, laws, and policies applicable to employees of his or her respective agency and also will adhere to the FBI’s ethical standards and will be subject to the Supplemental Standards of Ethical Conduct for employees of the Department of Justice. Where there is a conflict between the standards or requirements of the Participating Agency and the FBI, the standard or requirement that provides the greatest organizational protection or benefit will apply, unless the organizations jointly resolve the conflict otherwise.”

Section VI SECURITY CLEARANCE

A(4)

“Each Participating Agency fully understands that its personnel detailed to the JTTF are not permitted to discuss official JTTF business with supervisors who are not members of the JTTF unless the supervisor processes the appropriate security clearance and the dissemination or discussion possesses the appropriate security clearance and the dissemination or discussion is specifically approved by the FBI JTTF Supervisor. Participating Agency heads will be briefed regarding JTTF matters by the SAC or ADIC, as appropriate, through established JTTF Executive Board meetings.

Section IX RECORDS, REPORTS AND INFORMATION SHARING

(A) All JTTF materials and investigative record, including any Memorandum of Understanding, originate with, belong to, and will be maintained by the FBI. All investigative reports will be prepared by JTTF personnel solely on FBI forms. All information generated by the FBI or the JTTF will be controlled solely by the FBI and may not be removed from FBI space without the approval of the JTTF Supervisor. Dissemination, access or other use of JTTF records will be in accordance with Federal Law, Executive Orders, and Department of Justice and FBI regulations and policy, including the dissemination and information sharing provisions of the FBI Intelligence Policy Manual. As FBI records, they may be disclosed only with FBI permission and only in conformance with the provisions of federal laws and regulations, including Freedom of Information Act, 5 U.S.C, Section 552, and the Privacy Act of 1974, 5 U.S.C. Section 552a, as well as applicable civil and criminal discovery privileges. This policy includes any disclosure of FBI information, including JTTF materials and investigative records, to employees and officials of a Participating Agency who are not members of a JTTF, which must be approved by the JTTF Supervisor. All electronic records and information, including, but not limited to, systems, databases and media, are also regulated by FBI policy. JTTF members may request approval to disseminate FBI information from the JTTF Supervisor.”

Relevant Sections of:

SAN FRANCISCO POLICE DEPARTMENT (SFPD) GENERAL ORDER 8.10
GUIDELINES FOR FIRST AMMENDMENT ACTIVITY

I. STATEMENT OF PRINCIPLES

- A. GENERAL POLICY: It is the policy of the San Francisco Police Department to ensure that the First Amendment rights guaranteed by the United States Constitution are protected for all individuals and to permit police involvement in the exercise of those rights only to the extent necessary to provide for the legitimate needs of law enforcement in investigating criminal activity.
- B. WHEN A CRIMINAL INVESTIGATION THAT INVOLVES FIRST AMMENDMENT ACTIVITIES IS PERMITTED: The Department may conduct a criminal investigation that involves First Amendment activities of persons, groups or organizations when there is an articulable and reasonable suspicion to believe that:

3. They are planning or are engaged in criminal activity
 - a. Which could reasonably be expect to result in bodily injury and/or property damage in excess of \$2500
 - b. Or which constitutes a felony or misdemeanor hate crime,

and

4. The First Amendment activates are relevant to the criminal investigation.

C. WHEN THESE GUIDELINES APPLY

1. The Department must follow these guidelines in every criminal investigation that involves the Frist Amendment activities of a person, group, or organization. These guidelines do not apply to criminal investigations that do not involve First Amendment Activities.
2. These guidelines are intended to regulate the conduct of criminal investigations that involve First Amendment activities by requiring (1) written justification for the investigation and (2) written approval by the Commanding Officer of the Special Investigations Division, Deputy Chief of Investigation, and the Chief of Police.
3. These guidelines, however, are not intended to interfere with investigations into criminal activity. Investigations of criminal activities that involve First Amendment activities are permitted provided that the investigation is justified and documented as required by these guidelines.

II. DEFINITIONS

- A. First Amendment Activity: All speech, associations and/or conduct protected by the First Amendment and/or California Constitution Article I, section 2 (Freedom of Speech) an/or Article 3 (Right to Assemble and Petition the Government, including but not limited to expression, advocacy, association or participation in expressive conduct to further any political or social opinion or religious belief.)
- B. Articulable and Reasonable Suspicion: The standard of reasonable suspicion is lower than probably cause. This standard requires members to be able to articulate

the specific facts or circumstances indicating a past, current, or impending violation, and there must be an objective basis for initiating the investigation. A mere hunch is insufficient.

III. AUTHORIZATION REQUIRED FOR AN INVESTIGATION: (AKA the 8.10 Memo)

- A. A member of the Department may undertake an investigation that comes within these guidelines only after receiving prior written authorization by the Commanding Officer of the Special Investigations Division (SID), the Deputy Chief of the Investigations Bureau, and the Chief of Police. However, neither the Commanding Officer of SID, the Deputy Chief of the Investigations Bureau, nor the Chief of Police is authorized to approve an investigation and/or the gathering of information in violation of the terms of this General Order.
- B. To obtain written authorization, a member must submit a memorandum through their chain of command to the Commanding Officer of the SID containing the following:
 - 1. The identity of the subject of the proposed investigation, if known.
 - 2. The facts and circumstances that create an articulable and reasonable suspicion of criminal activity as defined in Section I.B.
 - 3. The relevance of the First Amendment activities to the investigation.
- C. When an investigation is authorized by the Commanding officer of SID and after review by the Deputy Chief of the Investigations Bureau, a copy of this memorandum shall be sent to the Chief of Police, who shall indicate his/her approval or disapproval.
- D. Time limits. Written approval of an investigation is in effect for 120 days. If the Department continues an investigation past 120 days, a new memorandum and approval must be obtained. The new memorandum must describe the information already collected and demonstrate, based on that information, that an extension is reasonable necessary to pursue the investigation.

VI. POLICE COMMISSION REVIEW (aka 8.10 Review/Audit)

- A. The President of the Police Commission shall designate a member of the Commission to be responsible for monitoring compliance with these guidelines.
- B. Every month, the designated Police Commission member shall review the written requests and authorizations for the initiation or continuance of an investigation that is required by these guidelines.
- C. On an annual basis, the Director of the Office of Citizen Complaints or his/her designee shall conduct an audit of the Department's files, records and documents and shall prepare a report to the Commission regarding the Department's compliance with the guidelines. In

addition, the Police Commission may conduct or direct the OCC to conduct such an audit unannounced at any time.

1. In conducting the yearly audit, the Office of Citizen Complaints shall review the following:
 - a. All current guidelines, regulations, rules and memoranda interpreting the guidelines:
 - b. All documents relating to investigations subject to Section III, and undercover techniques subject to Section IV.C. of these guidelines.
 - c. All Agency Assisted Forms or other documentation relating to the transmittal of documents to other criminal justice agencies as described in Section IX.B..
2. The Office of Citizen Complaints shall prepare a written report to the Police Commission concerning its annual audit, which shall include but not be limited to:
 - a. The Number of Investigations authorized during the prior year.
 - b. The number of authorizations sought, but denied.
 - c. The number of times that undercover officers or infiltrators were approved.
 - d. The number and types unlawful activities investigated.
 - e. The number and types of arrests and prosecutions that were the direct and proximate cause of investigations conducted under the guidelines.
 - f. The number of requests by members of the public made expressly pursuant to these guidelines for access to these records including:
 - i. The number of such requests where documents or information was produced,
 - ii. The number of such requests where the documents or information did not exist,
 - iii. The number of requests denied.
 - g. The number of requests from outside agencies, as documented by an Agency Assist Form, for access to records of investigations conducted pursuant to these guidelines including:
 - i. The number of such requests granted and

- ii. The number of such requests denied.
 - h. A complete description of violations of the guidelines, including information about:
 - i. The nature and causes of the violation and the sections of the guidelines that were violated.
 - ii. Actions taken as a result of discovery of the violations, including whether any officer has been disciplined as a result of the violation.
 - iii. Recommendations of how to prevent recurrence of violations of the guidelines that were discovered during the prior year.
 - iv. The report shall not contain data or information regarding investigation that are on-going at the time of the report's creation. The data and information, however shall be included in the first report submitted after the completion of the investigation.
 - i. A complete description of violations of the guidelines, including information about:
 - i. The nature and causes of the violation and the sections or the guidelines that were violated.
 - ii. Actions taken as a result of discovery of the violations, including whether any officer has been disciplined as a result of the violation.
 - iii. Recommendation of how to prevent recurrence of violations of the guidelines that were discovered during the prior year.
 - iv. The report shall not contain date or information regarding investigations that are on-going at the time of the report's creation. The data and information, however, shall be included in the first report submitted after the completion of the investigation.
- D. By the end of each calendar year, the Director of the Office of Citizens complaints shall deliver to the Police Commission a report containing the information in Section C(2)(a) through (g).

VII. VIOLATIONS OF THESE GUIDELINES

- A. If the Chief of Police, the designated Commission member or any member of the Department becomes aware of information that a possible violation of these guidelines has occurred, the Chief or designated member shall immediate inform the Police Commission and the member shall immediately inform his/her commanding officer who shall inform the Chief.

- B. If the Police Commission determines that a possible violation of these guidelines has occurred, it shall:
- C. If the Police Commission determines that an actual violation of these guidelines and/or the First Amendment (as defined in Section IIA above) has occurred, the Commission shall:
 - 1. Notify the Parties about whom information was gathered or maintained in violation of the guidelines pursuant to the following:
 - a. When information is related to individual or organization, the names and identifying information concerning private citizens other than the individuals notified shall be excised to preserve their privacy.
 - b. There shall be no disclosure if the disclosure of the information is reasonably likely to endanger the life, property or physical safety of any particular person.
 - 2. Refer the violation to the Chief of Police for recommendation concerning discipline of the members involved.
- E. All members of the Department shall be advised that willful or negligent violation of these guidelines shall subject the offending member to disciplinary action which may include suspension or termination.

Relevant Portion of:

San Francisco Police Department Operations Bureau Order of 5/18/11

From Paragraph 3

“SFPD Officers shall work with the JTTF only on investigations of suspected terrorism that have a criminal nexus. In situations where the statutory law of California is more restrictive of law enforcement than comparable federal law, the investigative methods employed by SFPD officers working on JTTF investigations shall conform to the requirements of such California Statutes”

From Paragraph 4

“The Department understands that the FBI SAC or designee needs the ability to direct the operational and day-to-day work of the SFPD officers who work with the JTTF. However, the Chief (and/or their designee) will review quarterly all investigations to which SFPD officers are or have been assigned. That said, SFPD officers who work with the JTTF remain in the chain of command and under the supervision of SFOD and must comply with Department policies at all times. Within 30 days after any change in personnel in the positions of the DGO 8.10 assigned Police Commissioner, Chief of Police, FBI SAC for the San Francisco Field Office, or United States Attorney for the

Northern District of California, the Chief or his designee shall ensure that the provision of this Order are presented to all new personnel.

Relevant Portions of:

San Francisco Ordinance amending Administrative Code §2A.74

POLICE DEPARTMENT PARTICIPATION IN FEDERAL COUNTERTERRORISM ACTIVITIES

- “The City and County of San Francisco, including but not limited to the San Francisco Police Department, may assist federal agencies on the FBI JTTF in preventing and investigating possible acts of terrorist and other criminal activity only in a manner that is fully consistent with the laws of the State of California, including but not limited to the inalienable right to privacy guaranteed by Article 1, Section 1 of the California Constitution, as well as the laws and policies of the City of County of San Francisco and, as applicable to the Police department, that Department’s policies, procedures and orders.”
- Any amendment to the SFPD FBI JTTF MOU or other written contract or arrangement the Chief of Police shall submit the proposed MOU and any related Department General Orders or Bureau Orders for discussion and public comment at an open meeting of the Police Commission.
- By January 31 of each year, the Chief of Police shall provide to the Police Commission a public report with appropriate public information on the Police Department’s work with the JTTF in the prior calendar year, including any issues related to compliance with this section.”